

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
JOSEPH BRANDON GOURLEY,  
Defendant.

NO. CR-06-6011-RHW

**ORDER DENYING  
DEFENDANT'S MOTION TO  
SUPPRESS, *INTER ALIA***

Before the Court are Defendant's Motion to Suppress Evidence and Request for Evidentiary Hearing (Ct. Rec. 23), Motion to Sever Counts (Ct. Rec. 26), and Motion to Demand Discovery (Ct. Rec. 29). A pretrial conference and suppression hearing was held on August 9, 2006. Defendant was present and represented by Robert Fischer; Assistant United States Attorney James Hagarty appeared on behalf of the Government.

At the hearing, the Government announced its intention to present a new theory regarding the legality of the search in question. The Government also announced that it was abandoning the theory relied upon in its memorandum in opposition to Defendant's motion to suppress. After questioning Mr. Hagarty as to why the Government was changing its response to Defendant's motion to suppress at such a late stage, the Court concluded it would take the motions under advisement to avoid prejudicing Defendant and to determine how best to proceed.

**I. Defendant's Motion to Suppress**

In his motion to suppress, Defendant asks the Court to suppress evidence of

1 a gun that was found during the execution of a search warrant which he alleges was  
2 based on tainted evidence acquired during an illegal search of his girlfriend's  
3 vehicle. Because both counts of the indictment are based on Defendant's  
4 possession of a firearm and, by extension, evidence regarding the firearm,  
5 Defendant's motion to suppress is dispositive.

6 **A. Background Facts**

7 The following facts were taken from various police reports generated in  
8 connection with Defendant's arrest on January 18, 2006.

9 On January 8, 2006, Defendant agreed to meet with a confidential informant  
10 ("CI") and to sell her \$100 worth of methamphetamine. The CI was working for  
11 the Tri-Cities Task Force. After several phone calls between Defendant and the CI,  
12 they agreed to meet at the Sally's Beauty Supply in Kennewick, Washington.  
13 Previously, the CI had warned the officers that Defendant was an escapee from the  
14 Department of Corrections, that probably there was an outstanding warrant (which  
15 officers confirmed), that he would probably be carrying a firearm, and that he  
16 would be driving a green Ford Explorer.

17 On January 18, 2006, the CI and an undercover agent drove to the store and  
18 parked next to a green Ford Explorer. Defendant was sitting in the driver's seat.  
19 The CI walked to the vehicle and purchased a baggie of what was later confirmed  
20 to be methamphetamine for \$100. After the CI returned from the vehicle,  
21 Defendant's girlfriend, Shelly Garza, returned from the store and entered the  
22 Explorer. At this point, the officers became concerned that Defendant would leave  
23 the area and a high-speed chase would ensue, so they arrested Defendant on the  
24 outstanding warrant. He was searched and the buy money was found on  
25 Defendant's person. Defendant was taken from the scene approximately ten  
26 minutes later.

27 Ms. Garza was placed in the back of a patrol car and was questioned for  
28 approximately 30 to 45 minutes. During this time, Ms. Garza stated that she was

1 the registered owner of the vehicle. It appears that at some point, she was told that  
2 her vehicle would be impounded or seized, but it does not appear that she was told  
3 that the vehicle would be searched. Ms. Garza protested when the police seized  
4 her vehicle, but gave the police a phone number and address where she could be  
5 reached when it was clear the vehicle was going to be impounded or seized.

6 At some point, Detective Runge of the Tri-Cities Task Force “secured the  
7 vehicle.” At that time, Detective Runge noticed a small amount of white powder  
8 that looked similar to methamphetamine. Detective Runge also found some money  
9 inside the vehicle. The vehicle was transported to the Metro Secured Vehicle  
10 Storage Compound, and the detectives submitted a warrant application to the  
11 Franklin County Superior Court. The application relied, in part, on the observation  
12 of the white powder. The court issued the warrant on January 20, 2006.

13  
14 On January 27, 2006, Detectives Runge and McCalmant executed the search  
15 warrant on the green Explorer. During the search, the detectives recovered, among  
16 other items, the following pertinent items: (1) one small baggie containing white  
17 powder (testing positive for methamphetamine) on the floor of the vehicle;  
18 (2) one small baggie containing white powder (testing positive for  
19 methamphetamine) inside a black duffle bag inside the passenger compartment of  
20 the vehicle; and (3) a loaded 9mm handgun found under the driver’s seat that was  
21 later confirmed to be stolen.

## 22 **B. Pending Motions**

23 During the discovery process, Defendant was provided with copies of the  
24 police reports, the affidavit in support of the warrant, and other discovery provided  
25 by the Government. In response, Defendant sought additional information  
26 regarding the procedures used to impound the car and filed a motion to demand  
27 discovery, seeking to examine the Metro Secured Vehicle Storage Compound  
28 where the Ford Explorer was taken and asking the Government to provide manuals

1 and policy statements regarding impoundment. In its response, the Government  
2 gave notice that it did not intend to provide the manuals because they were not  
3 relevant to the issues in this case, but would provide “documentation concerning  
4 any written impound procedure.”<sup>1</sup>

5 In his motion to suppress, Defendant set forth four theories as bases for the  
6 suppression of the evidence obtained in the search: (1) the warrantless search of the  
7 vehicle during the controlled buy was not justified by any exception to the Fourth  
8 Amendment’s warrant requirement; (2) the warrant obtained to further search the  
9 vehicle was invalid because it was based on tainted evidence; (3) the search  
10 violated Federal Rule of Criminal Procedure 41(f)(3) by not serving Defendant’s  
11 girlfriend or Defendant a copy of the warrant; and (4) the affidavit in support of the  
12 warrant contained misstatements or omitted facts. Defendant asserts under these  
13 grounds that all fruits of the search should be suppressed.

14 In its response, the Government argued the search incident to arrest  
15 exception to the warrant requirement justified the search of the vehicle. Notably,  
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17 <sup>1</sup>Specifically, the Government responded as follows:

18 The Government will provide documentation concerning any written  
19 impound procedure. However, the Government believes that this  
20 request contemplates legal issues not commonly a part of any  
21 impound procedure, therefore does not intent to provide any  
22 information, other than the written impound policy.

23 In response to Defendant’s request for copies of training manuals, the Government  
24 responded as follows:

25 The Government objects to this request, as the determination of  
26 impound, inventory and search warrant involve legal arguments, and  
27 the manuals are not relevant to that determination.

28 (Ct. Rec. 31).

**ORDER DENYING DEFENDANT’S MOTION TO SUPPRESS, *inter alia* ~ 4**

1 the Government did not mention the inventory search exception, and Defendant  
2 therefore did not discuss it beyond a footnote in his reply memorandum. The  
3 Government's failure to rely on the inventory search exception seems to have come  
4 as a surprise to Defendant, evidenced by Defendant's motion to demand discovery  
5 of the police department's impound procedures and policy manual.

6 At the hearing, Defendant presented his argument on all three of his  
7 motions, including his motion to suppress. After Defendant finished his  
8 presentation, the Government first responded to Defendant's motions to demand  
9 and to sever. The Government stated clearly it did not believe the impound  
10 procedures were relevant because there was not an impound in this case. At that  
11 time, the Court asked the Assistant United States Attorney if he agreed, therefore,  
12 that the issue is whether it was a search incident to arrest, as he stated in his  
13 briefing on the issue. The Government stated it did not agree, and at this point put  
14 forth a different theory. Counsel for the Government explained that he did not  
15 speak to the officers who conducted the search and seizure of the vehicle until the  
16 day before the hearing. After interviewing the officers, the Government apparently  
17 determined this was not a search incident to arrest and in fact was not a search at  
18 all; instead, this was an administrative seizure of a vehicle used in a drug  
19 trafficking offense.

20 This theory of defense to Defendant's motion to suppress does not appear in  
21 any of the Government's briefing. Although it had apparently learned of and  
22 developed this theory after interviewing the officers involved in the search the day  
23 before, the Government did not provide any notice to Defendant or the Court of its  
24 intention to introduce this theory and abandon the search-incident-to-arrest  
25 exception until after Defendant had presented his argument at the hearing.  
26 Additionally, the Government continued to object to Defendant's discovery request  
27 at the hearing, which clearly asks for manuals and/or policy statements relating to  
28 impounding "or otherwise seizing or securing a vehicle by force or by consent or

1 under any police procedure or state law or federal law[.]” (Ct. Rec. 29).

2 Additionally, at the close of the hearing, counsel for the Government made  
3 an additional argument:

4 I would like to say, your Honor, the Government’s position is  
5 that regardless if the court opens up the record or does not open up the  
6 record, the defendant hasn’t established there was a search, and I think  
7 that in this case, he alleges the search, but that has not been  
8 established, because there are not facts in the record in those reports  
9 that the car was searched.

10 (Ct. Rec. 39).

11 Like the first theory presented at the hearing, this theory of no search taking  
12 place was never briefed by the Government. Moreover, it is disingenuous that the  
13 Government is arguing that no search took place. An observation of the white  
14 powder was made—the observation clearly being a search—and a search was  
15 conducted pursuant to the search warrant. The fact that two searches were  
16 conducted is so obvious that it is incredulous to argue otherwise.

### 17 **C. Discretion to Reopen Argument**

18 Rule 12(b)(3)(C) of the Federal Rules of Criminal Procedure requires  
19 motions to suppress evidence be raised before trial. Failure to raise the motion to  
20 suppress before trial results in a waiver of the defense. Fed. R. Crim. P. 12(e);  
21 *United States v. Murillo*, 288 F.3d 1126, 1135 (9<sup>th</sup> Cir. 2002). These rules have  
22 been regularly construed broadly, generally to the detriment of defendants, to  
23 affect a waiver even when a party fails to raise a particular ground in support of a  
24 motion to suppress. *See, e.g., Murillo*, 288 F.3d at 1135 (holding that ground for  
25 suppression not included in pre-trial motion to suppress was waived); *United States*  
26 *v. Wright*, 215 F.3d 1020, 1026 (9<sup>th</sup> Cir. 2000) (“[F]ailure to bring a timely  
27 suppression motion constitutes a waiver of the issue.”); *United States v. Restrepo-*  
28 *Rua*, 815 F.2d 1327, 1329 (9<sup>th</sup> Cir. 1987) (*per curiam*) ( “Just as a failure to file a

1 timely motion to suppress evidence constitutes a waiver, so too does a failure to  
2 raise a particular ground in support of a motion to suppress.”). The Court may  
3 grant relief from a waiver, but only for good cause shown. Fed. R. Crim. P. 12(e);  
4 *Murillo*, 288 F.3d at 1135.

5 Although the waiver provision has regularly been applied to criminal  
6 defendants, the actual language of Rule 12(e) does not limit its application: “A  
7 party waives any Rule 12(b)(3) defense, objection, or request not raised . . . .” Fed.  
8 R. Crim. P. 12(e) (emphasis added). Just as a ground for suppression is waived  
9 when not timely raised, the Court finds a ground raised in opposition to a motion to  
10 suppress may be waived as well. Accordingly, the Court has no duty to consider  
11 the Government’s newly-minted theory of administrative seizure. *See United*  
12 *States v. Bush*, 794 F. Supp. 40, 44 (D.P.R. 1992) (stating the district court “need  
13 not consider” an issue in support of a motion to suppress because it was raised for  
14 the first time at the suppression hearing and not raised in briefing).

15 The Government has not shown good cause for the Court to consider its new  
16 argument. Instead, the Government has shown a distinct and serious lack of  
17 preparation and responsiveness to issues clearly raised. Notably, the Government,  
18 in filing its brief, made factual assertions and arguments apparently before  
19 conducting an investigation into the facts with the witnesses involved. The  
20 Government’s theory that no search ever took place was made without an adequate  
21 basis in law or fact. Such representations to the Court made without investigation  
22 violate the standard of practice expected from the United States Attorney’s office.

23 The United States has the largest and most powerful legal office in the  
24 nation, if not the world. It has a vital responsibility to criminal defendants, the  
25 courts, and to the public to exercise its powers responsibly and justly.  
26 Consequently, this Court and the laws of this country hold the Government to a  
27 high standard when it brings its authority to bear on individuals such as the  
28 Defendant. The Court therefore will exercise its discretion not to permit the

**ORDER DENYING DEFENDANT’S MOTION TO SUPPRESS, *inter alia* ~ 7**



1 Government's introduction of new grounds in response to Defendant's motion to  
2 suppress.

3 At the hearing, the Government abandoned its search-incident-to-arrest  
4 argument in opposition to Defendant's motion to suppress. Consequently, the  
5 Court finds no warrant exception applies to the Government's initial search of the  
6 vehicle and the evidence observed during this search was illegally obtained.

#### 7 **D. Search Warrant**

8 The Fourth Amendment protects the rights of people to be secure in their  
9 persons, houses, papers, and effects against unreasonable searches and seizures.  
10 U.S. Const. Amend. IV; *United States v. Hammett*, 236 F.3d 1054, 1059 (9<sup>th</sup> Cir.  
11 2001). Evidence obtained as a direct result of a Fourth Amendment violation may  
12 not be used to establish probable cause for a subsequent search. *United States v.*  
13 *Barajas-Avalos*, 377 F.3d 1040, 1054 (9<sup>th</sup> Cir. 2004). When an affidavit contains  
14 evidence that is illegally obtained, "[a] reviewing court should excise the tainted  
15 evidence and determine whether the remaining, untainted evidence would provide  
16 a neutral magistrate with probable cause to issue a warrant." *Id.* (citations  
17 omitted).

18 Here, the affidavit was written on January 20, 2006, two days after the  
19 impound or seizure of Ms. Garza's Explorer. The affidavit describes the  
20 circumstances of the controlled buy between Defendant and the CI, including  
21 Defendant's location in the driver's seat of the Explorer at the time of the  
22 controlled buy. It also includes the evidence observed during the Government's  
23 seizure of the vehicle, *i.e.*, the white powder and currency. Lastly, the affidavit  
24 states the vehicle was transported to the Metro Secured Vehicle Storage Compound  
25 pending application for the search warrant.

26 As discussed above, the Court finds that the evidence regarding the white  
27 powder and currency should be excised from the warrant. What remains is  
28



1 evidence regarding the controlled buy between Defendant and the CI.<sup>2</sup> The Court  
2 finds that this evidence is enough to establish probable cause to issue the warrant.

3 Defendant argues that the officers, in executing the warrant, violated Fed. R.  
4 Crim. P. 41(f)(3) because they failed to serve Ms. Garza or Defendant with a copy  
5 of the warrant. The Court disagrees. The function of the warrant is to “assure the  
6 individual whose property is searched or seized of the lawful authority of the  
7 executing officer, his need to search, and the limits of his power to search.” *United*  
8 *States v. Williamson*, 439 F.3d 1125, 1132 (9<sup>th</sup> Cir. 2006) (citations omitted). The  
9 warrant also gives notice to the person subject to the search what the officers are  
10 entitled to seize. *Id.* Consequently, service of the warrant is not necessary to  
11 meet its intended function when the individual is not present. Indeed, Fed.  
12 R.Crim. P. 41(f)(3)(B) allows officers to leave a copy of the warrant and receipt  
13 where the individual is not present.

14 Here, the record is clear that Ms. Garza was not present at the time the  
15 search warrant was executed. Nothing in the rule requires the officers to  
16 personally locate Defendant or Ms. Garza and serve the warrant.

17 Defendant alleges that the search warrant contains misstatements and  
18 omitted facts that require the Court to conduct a *Franks* hearing. Under *Franks v.*  
19 *Delaware*, 438 U.S. 154, 155 (1978), an evidentiary hearing is held at the  
20 defendant’s request when the defendant can make a substantial preliminary  
21 showing that an officer made a knowing and intentional false statement, or made  
22 the statement with reckless disregard for the truth, and a warrant was issued upon  
23 the statement. *Id.* “There is a presumption of validity with respect to the affidavit  
24 supporting the search warrant.” *Id.* Allegations of falsehood or of reckless  
25 disregard for the truth must be accompanied by an offer of proof, pointing out  
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27 <sup>2</sup>The sufficiency of the affidavit in support of the search warrant to establish  
28 probable cause was briefed by the parties.

1 specifically the portion of the warrant affidavit that is claimed to be false. *Id.*  
2 Evidence obtained as a result of the tainted search warrant will be excluded if the  
3 defendant can establish by a preponderance of the evidence that the warrant was  
4 obtained through perjury, and with the affidavit's false material set aside or the  
5 omitted information included, the remaining information is insufficient to establish  
6 probable cause. *Id.*

7 Defendant charges Detective Gregory with knowingly and intentionally  
8 omitting material information. Specifically, Defendant alleges the following  
9 deficiencies:

10 (1) The affidavit fails to describe any connection between the vehicle and  
11 the transaction;

12 (2) The affidavit fails to indicate a belief that the vehicle was used to  
13 transport the contraband;

14 (3) The affidavit only indicates that Defendant was the driver, but not that  
15 he was the seller, nor does it state that the officers observed Defendant ever  
16 driving the vehicle, arriving in the vehicle, or sitting in the vehicle, or that he  
17 conducted the transaction from the vehicle;

18 (4) The affidavit did not contain any allegations that Defendant was  
19 suspected of ongoing drug activity, or claimed that Defendant had more  
20 drugs to sell;

21 (5) Defendant was never identified as the owner of the vehicle;

22 (6) No allegations in the affidavit that the officers believed more drugs  
23 could be found in the vehicle after this single transaction.

24 Additionally, Defendant asserts the following material facts were omitted  
25 from the search warrant:

26 (1) The fact that the owner of the vehicle was detained by the police and  
27 was at the scene when the vehicle was secured;

28 (2) The facts regarding how the vehicle was secured;

**ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS, *inter alia* ~ 10**

1 (3) That Ms. Garza was not asked to consent to an inventory search;

2 (4) That the CI told the police that only the \$100 deal was discussed  
3 between Defendant and CI;

4 (5) That the CI never indicated that the CI had actual knowledge that  
5 Defendant was transporting any illegal substances other than what was  
6 discussed between the CI and Defendant;

7 (6) That what was actually sought was a gun that the CI had indicated the  
8 Defendant usually carried in his waist band, but was not found on him  
9 during the DOC arrest.

10 In reviewing the affidavit, the Court notes that the affidavit stated that the CI  
11 purchased meth from "Joseph Gourley," that Joseph Gourley was the driver of a  
12 1994 Ford Explorer, and that during the transaction the CI made contact with the  
13 driver of the 1994 Ford Explorer. There is nothing in the affidavit that would  
14 suggest that these were not one and the same event. Accordingly, the affidavit  
15 accurately described a controlled buy, and provided enough evidence to allow the  
16 issuing judge to conclude that a controlled buy between Defendant and the CI took  
17 place in or near the 1994 Ford Explorer, which was driven by Defendant, and  
18 which was eventually seized and transported to the Metro secured vehicle storage  
19 compound. The affidavit also included a statement that indicated that individuals  
20 who distribute illegal controlled substances commonly secret the drugs in secure  
21 locations under their dominion and control, including their vehicles, which  
22 provides further support for issuance of the search warrant.

23 Notwithstanding the above analysis, the Court notes that the identity of the  
24 Defendant, the identity of the seller, and the identity of the owner of the vehicle are  
25 immaterial in securing the warrant to search the vehicle. The officers were not  
26 trying to obtain a search warrant to search Defendant's residence. Instead, they  
27 were obtaining a warrant to search a vehicle that was undisputedly involved in a  
28 controlled buy. The fact that the controlled buy was made with the driver of the

1 vehicle indicates that it was more likely than not that the vehicle was used to  
2 transport the drugs. The fact that Defendant was the driver of the vehicle was  
3 immaterial in obtaining the search warrant.

4 Moreover, Defendant has not made a threshold showing that Detective  
5 Gregory made a knowing and intentional false statement, or made the statement  
6 with reckless disregard for the truth. The facts that Defendant suggests were  
7 omitted or were falsely made are not material to the determination of whether there  
8 was probable cause to issue the search warrant, when the search warrant was based  
9 on a controlled buy involving the 1994 Ford Explorer.

### 10 **III. Defendant's Motion to Sever**

11 Defendant also asks that the two counts be severed. This motion was not  
12 addressed fully at the hearing. Although the Government can stipulate to the prior  
13 felony, the stipulation would only apply to Defendant's Felon in Possession of a  
14 Firearm charge. Evidence of his prior felony would not be admissible at trial on  
15 the Use of a Firearm in Relation to a Drug Trafficking Offense charge. The  
16 potential for prejudice is great, and severing the two counts will ensure that  
17 Defendant will receive a fair trial.

18 Accordingly, **IT IS HEREBY ORDERED:**

19 1. Defendant's Motion to Suppress Evidence and Request for Evidentiary  
20 Hearing (Ct. Rec. 23) is **DENIED**.

21 2. Defendant's Motion to Sever Counts (Ct. Rec. 26) is **GRANTED**.

22 3. Defendant's Motion to Demand Discovery (Ct. Rec. 29) is **DENIED, as**  
23 **moot.**

24 4. The current trial date of August 21, 2006, is **stricken**. A new trial date is  
25 set for **October 10, 2006**, at 9:00 a.m., in Yakima, Washington. Counsel shall  
26 meet in chambers at 8:30 a.m. on the first day of trial.

27 5. Pursuant to 18 U.S.C. § 3161(h)(1)(F), the time between August 21,  
28 2006, the current trial date, until October 10, 2006, new trial date, is **DECLARED**

**ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS, *inter alia* ~ 12**

1 **EXCLUDABLE** for purposes of computing time under the Speedy Trial Act.

2 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
3 Order and to provide copies to counsel.

4 **DATED** the 7<sup>th</sup> day of September, 2006.

5  
6 *s/ Robert H. Whaley*

7 ROBERT H. WHALEY  
8 Chief United States District Judge  
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